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Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

—v.—

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

—v.—

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the court below correctly hold that discount brokerage, offered as a part of a national bank's general business, is subject to the statutory limits on the locations for that business?

2. Did the court below correctly hold that securities brokers harmed by competition from expanded locations for bank brokerage activities have standing to challenge a narrow construction of the statute arguably intended to limit that competition?

PARTIES TO THE PROCEEDINGS BELOW

Respondent Securities Industry Association was the plaintiff-appellant-cross-appellee below.* Defendants-appellees-cross-appellants below were C.T. Conover, then Comptroller of the Currency of the United States, and the Office of the Comptroller of the Currency. Petitioner Robert L. Clarke now serves as Comptroller of the Currency. Petitioner Security Pacific National Bank was permitted to intervene by the Court of Appeals after entry of the panel opinion now sought to be reviewed.

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* Pursuant to Rule 28.1 of this Court, respondent states as follows: The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for more than 90 percent of the securities brokerage and investment banking business in the United States.

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BRIEF IN OPPOSITION

National banks, since Congress created them a century ago, have been severely restricted both in what they can do and where they can do it. These petitions, concerning the latter issue, are little more than an attempt to seek reargument of matters long ago put to rest. Despite their rhetoric, the petitions raise no substantial issue not previously decided against the Comptroller either by this Court or, uniformly, by several Courts of Appeals.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE COURT BELOW CONSISTENTLY APPLIED SETTLED PRECEDENT IN UPHOLDING STATUTORY LIMITS ON BANK LOCATIONS

The decision below contains nothing startling. Applying settled precedent, it holds simply that discount brokerage, as a part of a national bank's general business, is subject to long-standing statutory restrictions on the location of that business.[1]

The Court has previously reviewed the governing statutory structure. When Congress created national banks through the National Bank Act of 1864, it restricted their activities to only one location.[2] Some 60 years later, in the McFadden Act of 1927, Congress permitted national banks to establish branches in certain circumstances.[3] Today, the "general business" of a national bank remains severely restricted to only "the place specified in its organization certificate" and such "branch or branches, if any" as may be established. 12 U.S.C. § 81 ("Section 81").[4]

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1 577 F. Supp. at 260; Appendix C at 28a-29a. Citations are to the Appendices annexed to the Comptroller of the Currency's Petition for a Writ of Certiorari. "Compt. Pet." refers to the Comptroller's Petition; "Sec. Pac. Pet." refers to Security Pacific National Bank's Petition.

2 *First National Bank in St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 656-58 (1924); *see* Rev. Stat. § 5190, ch. 106, 13 Stat. 101 (1864) (codified as amended at 12 U.S.C. § 81).

3 *See Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 42-43 (1977).

4 12 U.S.C. § 81 provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate

The Court addressed the statutory definition of a "branch" permitted under the McFadden Act almost 20 years ago, in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) ("*Plant City*"), and stated:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

Id. at 135 (footnote omitted, emphasis in original).[5] Applying this flexible construction, the Court there rejected the Comptroller's attempt to read the definition of "branch" narrowly, and held that an armored car messenger service operated by a national bank was a "branch" of that bank under the McFadden Act.

Courts of Appeals which have considered related branching questions also uniformly have refused attempts by the Comptroller to restrict the reach of the branching provisions. The

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and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

Significantly, the Comptroller failed even to mention the provisions of Section 81 in his ruling; only his appellate counsel's "*post hoc* rationalizations" discuss that section. For this reason alone, any substantial deference to the Comptroller's arguments would be unwarranted. *See Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979, 2983-84 (1984); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 628 (1971) ("*ICI I*").

5 The relevant section of the McFadden Act, which is codified at 12 U.S.C. § 36(f) ("Section 36(f)"), provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

Eighth Circuit in *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) ("*Mercantile Trust*"), for example, specifically declined the Comptroller's argument, advanced once again here, that the term "branch" includes only the three functions specifically enumerated in Section 36(f). The Court held that "the three routine banking functions delineated in section 36(f) are *not* the only indicia of branch banking," and struck down the Comptroller's effort to sanction a bank's trust office opened at a non-branch location. *Id.* at 719 (emphasis supplied). The Courts of Appeals for the Tenth, Seventh and District of Columbia Circuits have adopted a similar approach.[6]

The court below followed the same sort of rationale and, in reaching this conclusion, cited the statement of Representative

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6 *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) ("accepting deposits, or paying checks, or lending money are *not* the only indicia of branch banking. The typical bank of the present time provides many other services.") (emphasis supplied); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("*IBAA*").

Security Pacific tries to manufacture a conflict among the Circuits (Sec. Pac. Pet. at 8-18) that does not exist—an undertaking the Government understandably does not join. The "basic function" and "main office" tests postulated by Security Pacific misstate the holdings in prior decisions as well as the decision below. Prior decisions, such as *Plant City*, dealing with one of the specific activities mentioned in Section 36(f) did not define precisely the other activities permitted at a branch, because they did not need to. However, the rationale of the Eighth Circuit in *Mercantile Trust* and of the courts below in this case, which *did* reach this broader question, is no different from that set out by this Court in *Plant City* and each Court of Appeals to have construed the McFadden Act.

The extent to which petitioners reach to find *any* authority to support their position is, itself, telling: their sole authority is *Continental Illinois National Bank & Trust Co.* v. *Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976) (Compt. Pet. at 12; Sec. Pac. Pet. at 10-11), an unpublished memorandum opinion of a district court filed one month *prior* to the directly contrary ruling in *Mercantile Trust*.

McFadden found important by this Court and every Court of Appeals to have considered it:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office*, is a branch if it is legally established under the provisions of this act.

68 Cong. Rec. 5816 (1927) (emphasis supplied).[7]

It is actually the Comptroller who, by suggesting that Section 36(f) be limited only to bank activities involving "dealings with the public requiring a specialized banking or similar license," has urged an unprecedented interpretation. (Compt. Pet. at 18.) The Comptroller offers no support for this whole-cloth suggestion. Nor could he, in that two of the three functions enumerated in Section 36(f) itself—lending money and paying checks—require no national banking charter or other specialized license and are carried on by any number of entities. Obviously Congress did not intend any such restriction of the statutory definition.

Petitioners' further assertion (Compt. Pet. at 12; Sec. Pac. Pet. at 10) that the geographic limits on bank activities apply only to those functions expressly listed in Section 36(f) (receiving deposits, paying checks, or lending money), is equally unprecedented. If petitioners were correct, national banks for over a century could have located any activity other than the three listed in Section 36 anywhere in the country.[8] It is small

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7 577 F. Supp. at 259; Appendix C at 26a. *See, e.g., Plant City*, 396 U.S. at 134 n.8; *IBAA*, 534 F.2d at 931; *Mercantile Trust*, 548 F.2d at 719; *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d at 179; *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d at 500. In light of this precedent, petitioners' continuing effort to deride this legislative history as "post passage" (Compt. Pet. at 13 n.12; Sec. Pac. Pet. at 16) is, at best, unpersuasive.

8 Under this logic, banks could have located even the three activities enumerated in Section 36(f) nationwide during the 60 years before the branching provisions were enacted in 1927.

wonder that no court has ever reached such a preposterous conclusion, any more than any bank attempted to put it into practice for more than a century. Nor does it require review by this Court to point out the patent illogic of petitioners' assertion. As the court below put it, the Comptroller's argument

> ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

(577 F. Supp. at 260; Appendix C at 28a.) *Cf. Northeast Bancorp, Inc.* v. *Board of Governors*, 105 S. Ct. 2545, 2551 (1985).

Again, contrary to the petitions here, the decision below does not hold that every possible activity of a national bank would be included within these locational restrictions. The court expressly based its holding on the undeniable fact that the provision of brokerage services here "is clearly aimed at attracting and servicing customers conveniently." (577 F. Supp. at 260; Appendix C at 28a.) The court thus again applied a factor, customer convenience, that this and other courts uniformly have regarded as relevant in deciding branching questions.[9] The court below simply did not address, nor will its opinion affect, the location of bank support activities, such as data processing, that do not involve public contact. Nor does the decision below set any precedent concerning what *level* of bank activities may be permissible at remote locations; here, concededly, the brokerage facilities would involve the full panoply of discount brokerage services for the public.[10]

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9 *E.g.*, *Plant City*, 396 U.S. at 136-37 (armored car service); *IBAA*, 534 F.2d at 943 (CBCTs); *Mercantile Trust*, 548 F.2d at 719 (trust office).

10 The SIA has never contended, nor did the court below decide, that banks may not employ agents who must act elsewhere to perform functions in support of services offered at chartered locations, which is

In sum, geographic restrictions on the location of the business of national banks have existed since those banks were first created. The decision below, following reasoning of this Court and other Courts of Appeals, merely confirms those restrictions. There are no "special and important reasons" for granting a Writ of Certiorari in this action. Sup. Ct. Rule 17.

II.

THE COURT BELOW CORRECTLY APPLIED TRADITIONAL "STANDING" ANALYSIS

Petitioners concede, as they must, that "there obviously is adequate adversity of interest in this case to satisfy the requirements of Article III of the Constitution." (Compt. Pet. at 24 n.19; *see* Sec. Pac. Pet. at 19.) They also concede that the SIA would suffer "injury in fact" from the Comptroller's action. (Compt. Pet. at 19-20; Sec. Pac. Pet. at 19.) And, they concede that the SIA has standing to challenge the types of bank *activities* authorized by the Comptroller under the National Bank Act. (Compt. Pet. at 19-20; Sec. Pac. Pet. at 18-19.) Nevertheless, petitioners contend that this Court should review the holding below that the SIA similarly had standing under that Act to challenge the *locations* for which those activities were authorized.

Petitioners' restrictive analysis in this respect also has effectively been rejected by this Court. The "zone of interests" test raised by petitioners was first articulated in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S.

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all that was involved in *Merchants Bank* v. *State Bank*, 10 Wall. (77 U.S.) 604 (1871), cited by petitioners. (Compt. Pet. at 19; Sec. Pac. Pet. at 17.) That issue concerns the *level* of activities permissible for remote locations and not the *type* of permitted activities. *See Plant City*, 396 U.S. at 137 n.10. *See also Independent Bankers Ass'n of America* v. *Heimann*, 627 F.2d 486, 487 n.** (D.C. Cir. 1980), in which the court noted that when bank loan production offices exceeded a certain level of activity in providing services to customers, those offices would be branches subject to the Act's restrictions.

150 (1970), to reverse just the type of standing analysis petitioners now urge. In part that case, as here, concerned the standing of a bank competitor under the National Bank Act. As the Court explained, where a statute "*arguably* brings *a competitor* within the zone of interests protected by it," that competitor has standing to assert those statutory restrictions. *Id.* at 156 (emphasis supplied). The Court specifically rejected the Comptroller's argument, renewed here, that a statute must expressly protect a specific group to confer standing (397 U.S. at 157):

> The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of "aggrieved" persons who . . . are entitled to judicial review of "agency action."

Subsequently, in *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *ICI I*, 401 U.S. 617 (1971), also decided under portions of the National Bank Act, this Court affirmed the standing of competitors to challenge the Comptroller's rulings. The Court reached this result even though the specific competitors bringing suit were not mentioned in the legislative history. As the Court put it in *ICI I*, 401 U.S. at 620, the issue is whether "Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. . . . [W]hether Congress had indeed prohibited such competition was a question for the merits."

The court below applied just this analysis. Contrary to the dissent (758 F.2d at 740; Appendix A at 3a), the majority's decision here does not reduce the "zone of interests" inquiry into a single showing of "injury in fact." Rather, the district court opinion, adopted by the majority below, held that:

> [T]he branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities . . . [and] attempts to exceed those curbs would harm SIA's members. . . .

(577 F. Supp. at 258-59; Appendix C at 24a.) The court thus determined that the statutes "arguably legislate against the competition that the [SIA] sought to challenge," and properly upheld the SIA's standing, given the undisputed existence of injury-in-fact.[11] (*See id.*; Appendix C at 24a.)

The standing analysis petitioners here advance contains the same basic flaw that pervades both their argument on the merits and the dissent below. Each dwells solely on the branching language in Section 36 of the McFadden Act. They fail to consider that Section 36 is an *exception* to the broad prohibition of Section 81 in the National Bank Act, which is equally involved. The analysis thus incorrectly focuses only on the branching exception and ignores the basic locational rule. As the court below observed, Section 81 reflects the Congressional determination, evident throughout the National Bank Act, "to curb the scope of national banks' activities" in light of the unique nature and economic power of those institutions. (577 F. Supp. at 258; Appendix C at 24a.) And, as this Court has already made clear, competitors arguably protected by such a "curb" have standing to challenge administrative efforts, as here, to reduce it. In short, the standing analysis below raises no issue warranting review by the Court.

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11 To suggest a need for "clarification," petitioners cite (Compt. Pet. at 23-24; Sec. Pac. Pet. at 21, n.26) earlier opinions in which Judge Ginsburg argued that the District of Columbia Circuit was not properly applying the precedent of this Court. *E.g.*, *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 955 (D.C. Cir. 1982) (Ginsburg, J. concurring). However, petitioners entirely ignore later cases making clear that Judge Ginsburg's view has now prevailed in that Circuit and the issue resolved. *E.g.*, *Autolog Corp.* v. *Regan*, 731 F.2d 25 (D.C. Cir. 1984). Thus, as a member of the panel below Judge Ginsburg concurred in the decision and did not believe the matter required rehearing or rehearing *en banc*.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petitions for a Writ of Certiorari should be denied.

Dated: February 8, 1986

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